No. 15204

# United States Court of Appeals

## FOR THE NINTH CIRCUIT

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TORA UPSTEAD RYSTAD,

*Appellant,*

v.

JOHN P. BOYD, District Director,
Immigration and Naturalization Service,

*Appellee.*

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

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HONORABLE WILLIAM J. LINDBERG, *Judge*

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# BRIEF OF APPELLEE

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CHARLES P. MORIARTY
*United States Attorney*
*Western District of Washington*

RICHARD F. BROZ
*Assistant United States Attorney*

OFFICE AND POST OFFICE ADDRESS:
1012 UNITED STATES COURTHOUSE
SEATTLE 4, WASHINGTON

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# BRIEF OF APPELLEE

## JURISDICTIONAL STATEMENT

Jurisdiction of the District Court is conferred by provisions of Section 2241, *et seq.*, Title 28, United States Code; Sections 2201 and 2202, Title 28, United States Code; Section 1009, Title 5, United States Code; and Rule 65, Federal Rules of Civil Procedure;

jurisdiction of this Court is conferred by the provisions of Section 1291, Title 28, United States Code.

## STATUTES INVOLVED

The statutes involved are Section 1009, Title 5, United States Code; Sections 2201 and 2202, Title 28, United States Code; and Section 1251(a), Title 8, United States Code.

## STATEMENT OF THE CASE

This case came before the lower court upon appellant's petition for writ of habeas corpus, challenging an order of deportation against her. The factual background of the case is set forth in the return to the petition for writ of habeas corpus, and the record of administrative proceedings attached thereto. The return was not traversed in the court below, and is set forth on pages 14 through 17 of the transcript of the record on appeal. The basic facts are as follows:

The appellant is a native and citizen of Norway, an alien presently residing within the United States at Seattle, Washington. She entered the United States at the Port of New York on May 31, 1928, at which time she was admitted for permanent residence. (R. 14, 18, 19, 20).

On July 16, 1954, appellant was served with a copy of a warrant of arrest issued by the District Director of the Immigration and Naturalization Service, the appellee herein; said warrant charged that after appellant's entry into the United States she had been an alien who was a member of the Communist Party of the United States and therefore deportable under the immigration laws (R. 14, 18).

A deportation hearing on the charges set forth in the warrant of arrest was held thereafter, pursuant to notice, at which appellant was represented by counsel (R. 18). The deportation hearing commenced on August 24, 1954, at which time the Government introduced certain exhibits and the testimony of one witness; at the conclusion of the government's case and cross-examination, appellant requested and received a continuance for a period of 28 days to permit her to prepare her defense (R. 19). Upon the convening of the continued hearing on September 21, 1954, appellant moved to dismiss the charges against her, which motion was denied. The appellant did not testify in her own defense, or present controverting evidence to the charges against her, although she was given a full opportunity to do so (R. 19). The Special Inquiry Officer, in making his ruling on the hearing, took the position that an adverse inference could be

drawn by him in view of petitioner's failure to testify (R. 19).

The Special Inquiry Officer found as a matter of fact that the appellant is an alien, a native and citizen of Norway, and that after entry at New York on May 31, 1928, at which time she was admitted for permanent residence, she was a member of the Holly Park Branch of the Communist Party of the United States at Seattle, Washington, in 1945 and 1946. He concluded that appellant is subject to deportation under the provisions of the Immigration and Nationality Act of 1952, Section 241(a), 8 U.S.C. 1251(a), in that she has been, after entry, an alien who was a member of the Communist Party of the United States, and on September 27, 1954, he entered an order that the alien be deported from the United States pursuant to law (R. 19, 20).

Thereafter appellant appealed the decision of the Special Inquiry Officer to the Board of Immigration Appeals in Washington, D. C., and the decision was affirmed by said board. Appellant then filed a motion to reopen the proceedings with the Board of Immigration Appeals, and on August 9, 1955, during the pendency of said motion, filed a petition in cause number 3986, in the court below, for review of administrative proceedings, declaratory judgment, and

for injunctive relief and show cause (R. 16, 20). The chief issues raised in the subject case were determined by the lower court in said cause number 3986, that is, the legality of the deportation proceedings had already been determined in the prior cause (R. 16, 21); the Board of Immigration Appeals denied appellant's motion to reopen the deportation hearing on September 15, 1955, and thereafter, on November 10, 1955, with the complete administrative record before it, the District Court entered judgment in cause number 3986, denying the relief prayed for in the petition in said cause (R. 20). No appeal was taken from said judgment.

Thereafter appellant, on November 21, 1955, filed a motion for new trial in cause number 3986, and on the same date submitted a motion to the Board of Immigration Appeals entitled "Renewal of Motion to Reopen Hearing on the Ground of, and for the Purpose of Presenting, New Evidence." The Board of Immigration Appeals denied the second motion to reopen the deportation hearing on January 25, 1956 (R. 16, 21); the District Court denied the motion for new trial in cause number 3986 on January 4, 1956.

No appeal was taken in cause number 3986; appellant was ordered by the Immigration Service to report for deportation on March 27, 1956; on March

26, 1956, one day prior to the scheduled deportation, appellant filed another petition for "Habeas Corpus And Order To Show Cause; For Declaratory Judgment And Injunctive Relief" (R. 3, 16, 21). The lower court denied the petition, concluding that as a matter of law the deportation proceedings and motion to reopen had been judicially reviewed in cause number 3986, and the judgment of the court therein was final and determinative of the issues presented therein. The lower court further concluded that the order of the Board of Immigration Appeals, dated January 25, 1956, in which appellant's second motion to reopen the deportation proceedings was denied, neither denied appellant due process nor rendered the hearing unfair (R. 20, 21).

This appeal followed.

## QUESTIONS PRESENTED

1. Did the District Court properly deny appellant's petition for judicial review of deportation proceedings, after it had already reviewed said proceedings in prior cause number 3986 and entered judgment therein?

2. Did the District Court properly conclude that the order of the Board of Immigration Appeals dated January 25, 1956, denying appellant's second motion

to reopen the deportation hearing, neither denied appellant due process of law nor rendered the hearing unfair?

## SUMMARY OF ARGUMENT

The appellant challenged the legality of the deportation proceedings against her by filing an action for judicial review in cause number 3986 of the judicial district for the Western District of Washington, Northern Division. The issue of whether the deportation proceedings were valid was determined in the affirmative by the District Court in said cause, and no appeal having been taken from the judgment, that determination is final and conclusive as to all issues presented therein.

Appellant sought to relitigate the legality of the deportation proceedings by filing a second action for judicial review, which was not in any material way different from the original action. Only one additional fact had occurred between the entry of judgment in cause number 3986 and the entry of judgment in the second action (cause number 4111), which is claimed to be material to the action . . . *i.e.*, that the Board of Immigration Appeals had denied appellant's *second* motion to reopen the deportation hearing for the purpose of producing new evidence.

Under the circumstances, the trial court properly held that it had already exhausted its function as a court of review relative to the legality of the deportation hearing and administrative functions preceding appellant's second motion to reopen the deportaion proceedings; there remained only one matter for the court to review . . . the denial by the Board of Immigration Appeals of the second motion to reopen. The record fully supported the board's denial of said motion, and the court below had no alternative but to deny the challenge to the board's order. This the court did, and entered its order denying the petition for a writ of habeas corpus.

Appellant's position on appeal in essence challenges the sufficiency of the evidence in the administrative proceeding. This position completely ignores the fact that the issue had already been adjudicated in cause number 3986. The present appeal cannot serve as a vehicle to challenge the District Court's determination in the prior cause; that determination became final and conclusive when no appeal was taken in the first action within the time permitted for such an appeal. Appellant could not proceed before this Court by filing an appeal after the time for filing an appeal had run on the prior judgment; she cannot now appeal the same judgment by using the simple

expediency of filing the same action again in the District Court.

## ARGUMENT

### I.

*The District Court Entered Final Judgment in Cause Number 3986 on November 10, 1955; the Court's Judgment Therein Upheld the Legality of the Administrative Proceeding, and Said Judgment Is Not Subject to Appeal in the Present Cause By Reason of the Action Having Been Filed Again in the District Court.*

Appellant raises two chief questions on appeal. She first challenges the sufficiency of the evidence in the deportation hearings to sustain the lower court's judgment on judicial review, and secondly, the legality of the Board of Immigration Appeals' denial of appellant's second motion to reopen the deportation hearing to permit further testimony.

The District Court denied the appellant's petition for a writ of habeas corpus; the reason for the court's denial of relief on the question of the legality of the deportation hearing and subsequent administrative action preceding the appellant's second motion to reopen the deportation hearing, is apparent from the record . . . the sufficiency of the deportation hearing

had already been upheld by the court in a prior action between the same parties. The court had entered final judgment in cause number 3986 on November 10, 1955, after judicial review of the deportation proceedings including the appellant's original motion to reopen the deportation hearing. An examination of the findings of fact, conclusions of law, and final order in cause number 3986, which were attached to the return filed in this action, demonstrates that the court therein concluded that the Special Inquiry Officer could lawfully draw an adverse inference from appellant's failure to testify in her own behalf at the deportation hearing, and that the entire record of the deportation hearing did not show a denial of due process to the petitioner. The court further concluded that the findings of the Special Inquiry Officer were supported by reasonable, substantial, and probative evidence. *See* Exhibit C, attached to the return herein, and forwarded as enclosure number 3 in the certificate of the district court clerk to the record on appeal. The court declined to review the same matter again upon appellant's petition for habeas corpus, except to note that the matter had been judicially reviewed, and that the court's judgment thereon was final.

Appellant's petition for writ of habeas corpus was filed on March 26, 1956, more than four months

after final judgment had been entered in cause number 3986. The two actions are essentially the same, both involving the same parties, both seeking judicial review of the deportation proceedings. Presumably appellant relies on the fact that the present action is a habeas corpus proceeding, to which the doctrine of *res judicata* does not apply. But the rule does not permit relitigation of the same issue indefinitely, nor does it permit an appeal at a time wholly within the discretion of the petitioner. The matter having been once adjudicated, and no appeal having been taken from such adjudication, the judgment therein became the law of the case, and it is not subject to collateral attack by reason of the simple expediency of filing a petition in habeas corpus, raising the same issues again.

The present appeal does not present a situation wherein successive applications for writ of habeas corpus are taken, involving different issues which could have been but were not presented on the first application. Cause number 3986 sought judicial review of deportation proceedings under the declaratory judgment act and habeas corpus proceedings. The Government filed an answer to the petition, and final judgment was rendered after judicial review (R. 16; Exhibit C attached to the return forwarded to the record on appeal as enclosure number 3 of the district

court clerk's certificate to the record on appeal). The *same* relief was subsquently sought by appellant's petition in cause number 4111, the denial of which is the subject of this appeal.

Very nearly the same question was presented in *Cruz-Sanchez* v. *Robinson*, 136 F. Supp. 52. In that case the petitioner sought judicial review of an order of deportation first by habeas corpus, then by an action for declaratory judgment. The pertinent portion of Judge Byrne's well-reasoned decision is worthy of restatement here for the purpose of delineating the issue:

> "The question here is whether Cruz-Sanchez may have a redetermination of the same issues previously adjudicated. He relies on Shaughnessy v. Pedreiro, 349 U.S. 48, 75 S.Ct. 591, 594, and contends that it authorizes judicial review in both habeas corpus and declaratory relief and therefore he is entitled to *two* judicial reviews of the same administrative proceeding. That is not the holding of the Pedreiro case. The Pedreiro court held 'that there is a right of judicial review of deportation orders other than by habeas corpus' and that an action for declaratory relief is an appropriate remedy to obtain such a review. The clear holding is that judicial review may be had *either* by habeas corpus *or* an action for declaratory relief. The Administrative Procedure Act provides the 'form of proceeding for judicial review shall be * * * any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of com-

petent jurisdiction.' It could hardly be contended that Congress intended to permit successive judicial reviews of the same administrative action in each of the various forms authorized, with resultant endless litigation and the indefinite postponement of execution of the administrative order. The conclusion is inescapable that Congress intended but one judicial review of administrative action.

"Cruz-Sanchez says it is elementary that the doctrine of *res judicata* does not apply to habeas corpus. That is a correct statement of the law which is founded upon the recognition of habeas corpus as the privileged writ of freedom. It is because of this status that courts are not foreclosed from considering successive applications for the extraordinary writ. However, we are not concerned with the application of the doctrine of *res judicata* to habeas corpus proceedings. This is an action for a declaratory judgment and not an application for the Great Writ.

"Ordinarily the office of habeas corpus is exhausted when it is ascertained that the agency or court under whose order the petitioner is being held had jurisdiction to act and the requirements of due process were observed. Judicial review of an administrative proceeding may be had in habeas corpus because the Administrative Procedure Act so provides, 5 U.S.C.A. § 1009(b), and the scope of habeas corpus is enlarged accordingly. The scope of judicial review of deportation proceedings whether invoked by habeas corpus or an action for declaratory relief is delineated by section 242(b) of the Immigration and Nationality Act of 1952, 8 U.S.C.A. § 1252(b). See Marcello v. Bonds, 349 U.S. 302, 75 S.Ct. 757. Section 242(b) sets forth various

requirements with respect to notice, right to counsel, right to present evidence and to cross-examine witnesses and provides that decisions of deportability shall be based upon reasonable, substantial and probative evidence. The scope of the review is exactly the same whether the remedy pursued is habeas corpus or an action for declaratory relief.

"The plaintiff has been afforded judicial review and a court of competent jurisdiction has determined that the deportation proceedings complied with the conditions and provisions of Section 242(b). A judgment rendered by a court having jurisdiction of the parties and subject matter is conclusive and indisputable evidence as to all rights, questions, or facts put in issue in the suit and actually adjudicated therein, when the same come again into controversy between the same parties or their privies.

"Although the defense of *res judicata* should ordinarily be pleaded; where, as here, the complaint on its face shows the prior proceeding, such defense may be presented by motion to dismiss.

"An alien is not entitled to repetitious judicial reviews of deportation proceedings. If discontented with the result of the first judicial review, his remedy is by appeal. The motion to dismiss is granted. Counsel for defendant to prepare, serve and lodge a formal order pursuant to local rule 7."

*Cruz-Sanchez* v. *Robinson*, 136 F. Supp. 52, 53, *et seq.* (D.C., S.D. California, Central Division, 1955)

And so it is here. Appellant has already had a

judicial review of the deportation hearing, and if discontented with the results of the first judicial review, her remedy was by appeal. It is elementary that the office of habeas corpus may not be substituted for an appeal or writ of error, and that allowing the time to elapse within which an appeal might have been taken confers no right to habeas corpus as a substitute. *Goto* v. *Lane*, 265 U.S. 393, 402, 44 S.Ct. 525, 68 L.Ed. 1070 (1924); *Riddle* v. *Dyche*, 262 U.S. 333, 335, 43 S.Ct. 555, 67 L.Ed. 1009 (1923); *Frank* v. *Mangum*, 237 U.S. 309, 326, 35 S.Ct. 582, 59 L.Ed. 969 (1915).

Here the lower court entered judgment in appellant's first action for judicial review on November 10, 1955; more than four months later and one day prior to the date set for her deportation, appellant filed another action for judicial review. Under the circumstances the District Court was fully justified in ruling that the issues presented in the prior action of judicial review had been finally adjudicated, and in effect, were the law of the case. Appellant's attempt to bring them before this Court for review must fail for the same reason . . . the judgment of the lower court in appellant's first action for judicial review is a final and conclusive judgment, as no appeal was taken therefrom.

## II.

*The District Court Properly Held that the Order of the Board of Immigration Appeals of January 25, 1956, Did Not Deny Appellant Due Process or Otherwise Render the Deportation Proceedings Unfair.*

Final judgment was rendered in cause number 3986, appellant's first action for judicial review, on November 10, 1955. On November 21, 1955, appellant submitted a motion entitled "Renewal of Motion to Reopen Hearing on the Ground of, and for the Purpose of Presenting, New Evidence" to the Board of Immigration Appeals. The motion was denied on January 25, 1956 (R. 16, 21). A prior motion to reopen the hearing was denied on September 15, 1955, the legality of which denial was adjudicated in cause number 3986 (R. 20).

The second action for judicial review, *i.e.*, the subject habeas corpus proceeding, introduced nothing into the case that had not already been adjudicated except for the denial of appellant's "Renewal of Motion to Reopen." This motion did not differ materially from appellant's previous motion to reopen the deportation hearing; both motions had the same objective . . . to reopen the proceedings for the purpose of offering further evidence on the issue of appellant's mem-

bership in the Communist Party. (Both motions were attached to the government's return to the petition in the court below, and were forwarded under the district court clerk's certificate to the record on appeal as enclosure number 3.)

The order of the Board of Immigration Appeals denying the "Renewal of the Motion to Reopen" (also attached to the return to the petition and forwarded to the record on appeal under enclosure number 3) demonstrates that the board fully considered the merits of the motion prior to entering its order of denial:

> "Upon careful consideration of the record and representations made in support of the instant motion and prior motion, we have again concluded that a reopening of the proceedings is not warranted." Page 3, Order of the Board of Immigration Appeals dated January 25, 1956.

The relevant facts constituting the background of this case were set forth in the return to the petition for writ of habeas corpus, and the record of deportation proceedings attached thereto; they were not traversed, and were accepted as conclusive by the court below, as provided for under the provisions of 28 U.S.C. 2248. *Vitale* v. *Hunter*, 206 F. 2d 826, 829 (C.A. 10, 1953). A brief summary of these facts here may serve to place appellant's position relating to the

denial of the "Renewal" of the motion to reopen in perspective.

The Government relied upon the testimony of one witness and certain exhibits to establish the fact that appellant is an alien, and that she had been a member of the Communist Party in 1945 and 1946, after her entry into the United States. After the Government presented its case, and after extensive cross-examination of the Government witness, the appellant's attorney asked for and received a continuance of 28 days in order to prepare her defense. At the continued hearing, the appellant made no attempt to defend the matter except to move to dismiss the proceedings. The motion was denied, and the appellant was in effect advised that the Government had made a *prima facie* case. She nevertheless chose to remain silent, to offer no evidence, to offer no statement or witnesses in her own behalf. *See* pp. 56, 57, 58, transcript of hearing, attached as Exhibit A to the government's return and forwarded to the record on appeal under enclosure number 3 of the district court clerk's certificate.

Appellant's *first* offer to rebut the case against her came *after* the Special Inquiry Officer found her to be deportable as an alien who had been a member of the Communist Party of the United States after entry.

The entire record of the deportation hearing demonstrates that the finding of the Special Inquiry Officer was fully substantiated by the evidence. There was no contradicting evidence. As reflected on pages 9 and 33 of the transcript of the deportation hearing, the Government witness, who identified himself as the membership director of the Holly Park Branch of the Communist Party of the United States, positively identified appellant as a member of that unit of the Communist Party. On page 56 of the transcript, the colloquy discloses that appellant's attorney was satisfied with the 28 day continuance granted appellant to permit her to prepare a defense. Yet she made no defense at the expiration of that time, and did not offer to do so until after the matter had been determined adversely to her. She is now in the position of urging that the Board of Immigration Appeals, in declining to reopen the hearing to permit her to introduce evidence on issues which had already been resolved, rendered the deportation proceedings procedurally so defective as to deprive her of due process of law. *It is submitted that the administration of deportation hearings would be effectively blocked if the subject of the hearing could await a decision in the case before deciding to testify, and then secure a second hearing on the same issues.* Under such a procedure, why testify in any deportation case until an order of

deportation has been entered? Appellant's position regarding the issue of whether a denial of due process resulted from the board's refusal to order the hearing reopened is clearly untenable. The lower court was strictly limited, in judicial review of the deportation proceedings preceding appellant's second motion to reopen the hearing, to a determination of whether the deportation order was based upon "reasonable, substantial, and probative evidence." *United States ex rel. Brzovich* v. *Holton*, 222 F. 2d 840, 842 (C.A. 7, 1955). The District Court made such a determination in cause number 3986; the court's findings of fact, conclusions of law, and judgment in that cause were incorporated by reference in the return in the present case, and were determinative of the sufficiency of the evidence in the deportation hearing.

The lower court was similarly restricted in its function of judicial review as to the denial of appellant's second motion to reopen; the scope of its review was clearly defined in *Quattrone* v. *Nicolls*, 210 F. 2d 513, 516 (C.A. 1, 1954), certiorari denied 347 U.S. 976, 98 L.Ed. 1116, 74 S.Ct. 786.

> "A petition for writ of habeas corpus was denied by the district court and this appeal resulted.
>
> "The appellant contends that he was deprived of due process of law in the deportation hearings

> because the hearings were procedurally unfair. Judicial review on this issue is limited to whether or not '* * * there was some evidence from which the conclusion of the administrative tribunal could be deduced and that it committed no error so flagrant as to convince a court of the essential unfairness of the trial', U.S. ex rel. Vajtauer v. Commissioner of Immigration, 1927, 273 U.S. 103, 106, 47 S.Ct. 302, 304, 71 L.Ed. 560, and whether or not the appellant had a fair opportunity to be heard. The Japanese Immigrant Case (Yamataya v. Fisher), 1903, 189 U.S. 86, 23 S.Ct. 611, 47 L.Ed. 721; Bilokumsky v. Tod, 1923, 263 U.S. 149, 44 S.Ct. 54, 68 L.Ed. 221."

The record in the subject case demonstrates that the order of deportation was supported by reasonable, substantial, and probative evidence; the lower court so held in a prior determination, and the record amply demonstrates that the appellant was given a full opportunity to be heard, although she did not avail herself of it.

Under the circumstances, the District Court properly denied the writ.

## CONCLUSION

Although the issue of the sufficiency of the evidence is not before the Court because that issue was adjudicated in the first action for judicial review, from which judgment no appeal was taken, the record

adequately rebuts appellant's argument as to its sufficiency. The finding of deportability is fully substantiated by the record. Only after that determination had been made did appellant elect to defend herself from the charges against her, by filing her first motion to reopen the deportation hearing. Failing in this, appellant filed her first action for judicial review.

When the lower court sustained the order of deportation upon judicial review, appellant did not appeal. She elected instead to file another motion to reopen, and await further administrative action. The Board of Immigration Appeals denied the second motion to reopen on January 25, 1956, and appellant did nothing further relevant to the decision of the Special Inquiry Officer until she was ordered to report for deportation on March 27, 1956. On March 26, 1956, she filed the subject petition for habeas corpus, in sufficient time to delay deportation.

Under the circumstances, the District Court was limited in its function of judicial review to determing whether the deportation order was vitiated by the denial of appellant's second motion to reopen the deportation hearing. As the court was bound by its prior decision as to the sufficiency of the evidence in the deportation hearing, and as the record showed that

appellant had been afforded an ample opportunity to be heard, the court properly declined to grant the writ. For the foregoing reasons, it is respectfully urged that the decision of the court below be affirmed.

Respectfully submitted,

CHARLES P. MORIARTY
*United States Attorney*

RICHARD F. BROZ
*Assistant United States Attorney*